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IN THE

# Supreme Court of the United States

..... Term 195....

No. 637

JOHN D. MYERS,
*Petitioner,*

vs.

JOHN B. HOLLISTER,
Director,
International Cooperation Administration,
PHILIP M. YOUNG,
Chairman,
and
GEORGE M. MOORE,
FREDERICK J. LAWTON,
Commissioners,
United States Civil Service Commission
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES F. O'NEALL
FRANCIS C. BROOKE
*Counsel for Petitioner*
1625 K Street N. W.
Washington 6, D. C.

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## INDEX


| | page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutes Involved | 2 |
| Statement | 4 |
| Reasons for Granting the Writ | 5 |
| I. The Decision of the Court of Appeals, by Disparaging Rights Which Congress Has Consistently Insured to Veterans in the Civil Service, Has Raised Questions of General and Continuing Importance in Federal Law | 5 |
| II. The Decision of the Court of Appeals Is in Conflict with Applicable Decisions of This Court | 11 |
| III. Since No Other Court of Appeals Can Ever Speak on the Problem here Involved, the Division in That Court in This Case Suggests the Need for Review by This Court | 14 |
| Conclusion | 15 |
| Appendix A: Opinion, United States District Court for the District of Columbia | 16 |
| Order | 18 |
| Appendix B: Majority Opinion, United States Court of Appeals for the District of Columbia Circuit | 18 |
| Dissenting Opinion | 23 |
| Appendix C: The predecessor of "the MSA proviso."; Section 504(d) of Title V of the Mutual Security Act of 1951 | 25 |
| Appendix D: The MSA proviso; Section 7(f) of the Mutual Security Act of 1952 | 25 |

page

Appendix E:
Section 12 of the Veterans Preference Act ..... 26

Appendix F:
Section 2 of the Veterans Preference Act ..... 27

## TABLE OF CASES

**Akelmacker v. Kelly** (1951)
101 FSup 528 ..... 14

**Blackmar v. Guerre** (1952)
342 US 512 ..... 14

**Kerr v. Barnes** (to be appealed)
unreported in United States District Court for the District of Columbia ..... 7, 10

**Posadas v. National City Bank** (1936)
296 US 497 ..... 5, 13

**Rosenberg v. United States** (1953)
346 US 273 ..... 5

**United States v. Borden Co.** (1939)
308 US 188 ..... 5, 12, 13, 14

## TABLE OF STATUTES

Veterans Preference Act of 1944
Act of June 27, 1944, 58 Stat. 387,
5 USC 861 ..... 2, 3, Appendix E
5 USC 851 ..... 2, 9, Appendix F
Mutual Security Act of 1951, Sec. 504(d)
65 Stat. 373, 379 ..... 3, Appendix C
Mutual Security Act of 1952, Sec. 7(f)
66 Stat. 141, 144 ..... 3, Appendix D
Act of March 3, 1865, 13 Stat. 571,
Sec. 1754 R.S. ..... 6
Act of August 15, 1876, 19 Stat. 169 ..... 6
Act of January 1, 1883, 22 Stat. 403, 406 ..... 6
Act of August 23, 1912, 37 Stat. 413 ..... 6
Act of March 3, 1919, 40 Stat. 1293 ..... 6

In The

# Supreme Court of the United States

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No.

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John D. Myers,
*Petitioner,*

vs.

John B. Hollister,
Director,
International Cooperation Administration,
Philip M. Young,
Chairman,
and
George M. Moore,
Frederick J. Lawton,
Commissioners,
United States Civil Service Commission
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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John D. Myers, petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit (hereinafter referred to as "the Court of Appeals" or "the court below") to review the judgment entered in this cause on September 1, 1955.

## OPINIONS BELOW

The United States District Court for the District of Columbia (hereinafter referred to as the "District Court") dismissed petitioners complaint. The bench opinion of the motions judge does not appear in the reports of the Federal Supplement; however, that opinion and the order of dismissal are reproduced in Appendix A, *infra*.

The majority and dissenting opinions of the Court of Appeals have been reported (226 F2d 346) and are reprinted in Appendix B, *infra*.

## JURISDICTION

The judgment with which this Petition is concerned was entered and recorded in the Court of Appeals on September 1, 1955.

Time for petitioning for review by writ of certiorari was extended until January 20, 1956 by order of the Chief Justice of the United States.

The jurisdiction of this Court to entertain the instant Petition is invoked under 28 USC 1254(1).

## QUESTION PRESENTED

The question presented is whether the reduction-in-personnel proviso in the Mutual Security Act of 1952 impliedly repeals the employment retention rights of qualified preference eligible veterans specified in Sections 2 and 12 of the Veterans Preference Act of 1944, as amended.

## STATUTES INVOLVED

The reduction-in-personnel proviso in the Mutual Security Act of 1952 (hereinafter referred to as "the MSA

proviso") amended Section 504(d) of Title V of Public Law 165, 82nd Congress, 1st Session, approved October 10, 1951 65 Stat. 373, 379:22 USC 1655(d)(1). The text of Section 504(d) as it read prior to amendment (i.e., prior to enactment of the MSA proviso) is reproduced in Appendix C, *infra.*

The MSA proviso itself is found in Section 7(f) of Public Law 400, 82nd Congress, 2nd Session, approved June 20, 1952 66 Stat. 141, 144. The MSA proviso was not codified in Title 5 of USC (wherein are found laws relating to civil service employee retention rights, etc.); instead, the MSA proviso was codified in Title 22 of USC (wherein are found laws concerned with foreign relations); and, it there appeared in 22 USC 1655(d)(2) and (3) until deleted from the current pocket part. The MSA proviso is reproduced in Appendix D, *infra.*

The employment retention rights of all civil service employees, and of preference eligible veterans in particular, are specified in Section 12 of the Veterans Preference Act of 1944, as amended, Act of June 27, 1944, c. 287, 512, 58 Stat. 390; 5 USC 861. This statute (hereinafter referred to as "Section 12" or "5 USC 861") is reproduced in Appendix E, *infra.*

Employment retention rights are also referred to in Section 2 of the Veterans Preference Act of 1944, as amended, Act of June 27, 1944, c. 287, Sec. 2, 58 Stat. 387, amended July 26, 1947, c. 343, Title II, Sec. 205(a), 61 Stat. 501; January 19, 1948, c. 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; August 26, 1949, c. 513, 63 Stat. 666; December 27, 1950, c. 1151, Sec. 1, 64 Stat. 1117; July 14, 1952, c. 728, Sec. 1, 66 Stat. 626. This statute (hereinafter referred to as "Section 2" or "5 USC 851", and is reproduced in Appendix F, *infra*) was last amended before the MSA Director undertook to dismiss Mr. Myers on the theory that the MSA proviso impliedly repealed the Veterans Preference Act *pro tanto.*

## STATEMENT

This Petition seeks review of the decision of the Court of Appeals which affirmed the District Court judgment which granted the Government's motion to dismiss. The affirmance was by a divided court.

The Court of Appeals stated the facts as follows:—

> "This case involves the construction of the so-called MSA proviso contained in Section 7(f) of the Mutual Security Act of 1952, 22 USC 1655(d) (1952). The proviso is to the effect that ninety days after the enactment of the Mutual Security Act of 1952 the personnel administering the Act, with certain exceptions not material here, shall be in the aggregate at least five percent less than the number on June 1, 1952: 'Provided further, That after the Director [of Mutual Security] has determined the reduction to be effected in each agency, the determination as to which individual employee shall be retained shall be made by the head of the agency concerned.'
>
> "Plaintiff-appellant was a veteran preference eligible, in the classified competitive civil service, employed by the Mutual Security Agency. He was discharged on September 17, 1952, during the ninety-day period mentioned in the MSA proviso, without regard to the reduction in force procedures prescribed by the Civil Service Commission pursuant to the Veterans Preference Act, 5 USC 861, 863 (1952). His appeal to the Civil Service Commission was dismissed on the grounds that under the MSA proviso his discharge was within the discretionary authority of the head of the employing agency. Plaintiff-appellant then filed this suit in the District Court. He asked that his discharge be set aside and that he be restored to his position. The District Court dismissed the complaint on the basis of the MSA proviso. This appeal followed."

## REASON FOR GRANTING THE WRIT

### I. The Decision of the Court of Appeals, by Disparaging Rights Which Congress Has Consistently Insured to Veterans in the Civil Service, Has Raised Questions of General and Continuing Importance in Federal Law.

The majority opinion of the Court of Appeals introduces confusion and doubt into one area of the law governing the construction of Federal statutes which heretofore had been clear at least so far as concerns statement of principle. Thus, until the court below spoke, it was well settled that implied repeals were not favored. The decision of the Court of Appeals is at variance with the *rationale* of a host of earlier decisions and pronouncements of this Court on this subject.[1]

The specific question in the instant litigation has not been settled by this Court. Of the many reasons which indicate that this particular case and its particular question should be settled in this Court, the three following ones are particularly cogent:—

(a) The importance of the right which the Court of Appeals invalidated affords ample justificaton for this Court to take jurisdiction, for that right represents the

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[1] This rationale is expressed in **Posadas v. National City Bank** (1936) 296 US 497, 503 as follows:— "The cardinal rule is that repeals by implication are not favored. When there are two acts upon the same subject, effect should be given to both if possible." Decisions of this Court to this point are too numerous for citation. Almost the same language appears in **United States v. Borden Co.** (1939) 308 US 188, 199. A recent application of this rule appears in the majority opinion in **Rosenberg v. United States** (1953) 346 US 273, 294-5. This opinion, rendered a year after the enactment of the MSA proviso, reiterates the rule in all its vigor. Likewise it repeats the well-known corollary that the intention to repeal must be "clear and manifest." Despite the timeliness of this decision, the Court of Appeals seemingly has ignored it.

clear, repeated,[2] and unequivocal expression of Congressional policy and it is a right conferred upon hundreds of thousands of our citizens.[3] There is no correspondingly clear statement by the Congress impugning that right, and the result reached by the Court of Appeals rests upon the view of only two of the three judges to whom the case was submitted.

(b) The language in the MSA proviso upon which the implied repeal was found in this case is similar to lan-

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[2] In House Report No. 1289 of the 78th Congress, 2nd Session (reported in US Code Congressional Service for 1944, at page 1154) the House Committee on Post Office and Civil Service in reporting on the legislation which later became the Veterans Preference Act of 1944 had the following to say in Paragraphs 2 and 3 under the heading "General Statement":—

"GENERAL STATEMENT

"It has been the policy of the United States Government since the beginning of the Republic to extend certain benefits to those who have risked their lives in the armed services during wartime. Since shortly after the Civil War, the Congress has provided in various statutes for different forms of preference in governmental employment to war veterans. These statutes have usually been applied under Executive orders and regulations promulgated by the President.

"For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted public hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. * * *"

Some of the statutes which give evidence of the long continuing interest of the Congress in this matter are as follows:—

Act of March 3, 1865; 13 Stat 571; Sec. 1754 R. S.
Act of August 15, 1876; 19 Stat. 169
Civil Service Act of January 1, 1883; 22 Stat. 403, 406.
Act of August 23, 1912; 37 Stat. 413.
Census Act of March 3, 1919; 40 Stat. 1293
Veterans Preference Act of June 27, 1944; 5 U.S.C.A.

[3] Approximately one-half of all Civil Service employees are "preference eligible" veterans.

guage which has been used before and it, of course, may be used again by Congress.[4] Therefore, if this Court grants the instant petition it will be able to decide an important issue which will govern other cases involving similar conflict. In fact, the present decision of the Court of Appeals in the instant litigation has been, and is being, relied upon in similar cases now in the District Court.[5]

(c) The need for this Court to guide the federal judiciary in the fundamentals of statutory construction is too apparent to require elaboration. If the instant petition involved nothing beyond a question as to whether the Court of Appeals gave proper effect to the Veterans Preference Act, it would still merit review by this Court for the reasons given in (a) and (b) above; but, the instant litigation involves vastly more—its reach extends to the heart of the problem of implied repeal. This Court has heretofore dealt with this recurring problem.[6] The frequency of that concern is perhaps the best guarantee that there must be many more decisions from this Court on the same vexing problem. The instant petition is a peculiarly suitable vehicle for it provides an intrinsically important as well as a suitably exemplary basis for this Court to further clarify that troublesome topic.

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[4] See Appendix C, *infra*. See also Small Business Act of 1953, Sec. 218(b), 67 Stat. 239, construed in Kerr v. Barnes, *infra*, note 10.

[5] The exact number is not known but government counsel will admit that there are several.

STATUTES

[6] The United States Supreme Court Digest (1949 Ed) under Sec. 229, "Judicial Policy, Necessity of Clear Intent or Irreconcilable Repugnancy," contains three and one-half pages of citations and digests to the proposition that repeals by implication are not favored and that clear intent or positive repugnancy must exist before an implied repeal can properly be found.

## A. THE INTRINSIC JUSTIFICATION

Since the birth of the Republic, our Government has concerned itself with efforts to ameliorate the sacrifices—both voluntary and involuntary—incurred by those who bear arms in its defense. Rights thus founded merit the most painstaking protection by the courts. All legal rights may be theoretically equal in their essence, but a right founded upon a moral obligation of the sovereign is one which partakes of the highest qualities which can inhere in sovereignty. This Court has not hesitated to conserve the fullest measure of rights so founded, and it would be but further evidence of this traditional concern if the instant Petition be allowed.

Without trespassing on the merits of the issue, it can be fairly said that the present decision rests fundamentally on the apparent desire of the court below to give the fullest possible meaning to every word and phrase in the MSA proviso while regarding Section 12 of the Veterans Preference Act as a mere subject for erosive action.

When the Congress enacted the MSA proviso it sought to correct a temporary imbalance. In that preemptory order to reduce personnel the Congress gave no evidence of a desire to suspend or dispense with the particular rights which it has earlier given to preference eligible veterans. The unknown author of one of the five committee reports which dealt with the act which finally produced the MSA proviso may have so intended, but he (or they) failed to even tender language in the proposed legislation adequate to make such intent clear.[7]

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[7] Footnote No. 8 in the majority opinion of the Court of Appeals contains one entirely incorrect statement of fact and except for the qualifying phrase "sofar as we have been advised" it contains another more serious misstatement and creates a false impression as to the legislative history. First, the original draft of the MSA proviso did not remain untouched; it was changed in the Conference Report. Even more important, however, is the fact that there was no report to the Senate

No one can say, now that the second ranking member of the Court of Appeals has agreed with petitioner's position, that the comparative dominance of the two statutes here involved is free of question. Until Judge Prettyman's dissent was entered in this cause, the substance of the Government's position was simply that the Government's reading of the MSA proviso was so obviously correct that there was no room for argument.[8] It can be noted that the Veterans Preference Act is expressly designed to govern in instances where a reduction in civil service personnel must be made. Section 12 suggests no exception.[9] In the face of the specific and absolute declaration of Congressional policy set forth in the Veterans Preference Act, and notwithstanding the acknowledged rule that implied repeals are not favored by the law, the court below found that a preemptory order to reduce personnel engaged in the work of the Mutual Security Program was an order which could be complied with without regard to the Veterans Preference Act. Whether that decision is right or wrong is a question which goes to the merits of this litigation. But it is evident that the issue is one of importance and general federal law—the very kind of problem with which this Court is properly concerned—for the present decision marks the Veterans Preference Act as an inert mass to lie supinely and be eroded away.

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which contained language in any way comparable to that which so impressed the Court of Appeals below. In fact, a study of the legislative history clearly establishes the fact that the Senate was led to believe that the only purpose of the MSA proviso was to effect "some reduction of personel." (*Congressional Record*—82nd Congress, 2nd Session—Volume 98, Part 5 at page 6666, June 5, 1952). But this sort of material, of course, belongs in the brief on the merits.

[8] See Government's brief in the court below.

[9] In pertinent part, Section 2 of the Veterans Preference Act (5 USC 861) states:

"In *any* reduction of personnel in *any* civilian service of *any* Federal agency * * *" (Emphasis added).

Since a specifically declared and long-standing policy of the Congress has been found to be inadequate in the face of the judicial construction of a transitory Congressional order, a problem worthy of the power which this Court alone can exercise is presented. If a statute such as the Veterans Preference Act can be suspended by a construction of another and obviously less significant statute which may, but not must, be found to be inconsistent with it, it behooves this Court to so declare the law and to repudiate the law to the contrary which has so often been announced. This petitioner, of course, does not believe that this Court would reach such a conclusion, and petitioner agrees with the dissenting judge of the Court of Appeals that there was no basis in this case for implied repeal; but, this argument trespasses upon the merits.

## B. THE EXTRINSIC JUSTIFICATION

In the brief which the Government filed in the Court of Appeals, reliance was placed upon an unreported decision of the District Court which had dealt with a problem similar to that involved in the present litigation. That case, in turn, had rested on the District Court's decision in the present litigation.[10] This affords ample proof of the fact that the decision in the present controversy is one which reaches beyond the particular facts in this case. The desire of the Congress to effect savings in the administrative department of the Government is laudable, and such efforts should not be frustrated. But it does not follow that administrators or courts are to

[10] Kerr v. Barnes, Civil Action No. 2406-54 in the District Court, decision not reported in Federal Supplement. See footnote on page 11 of the Government's brief in the Court of Appeals. The propriety of the citation itself is questionable. Thus, the Government cited the case of Kerr v. Barnes as authority for the Court of Appeals notwithstanding the fact that an earlier decision in the Myers litigation was primary authority relied upon in reaching the result in Kerr v. Barnes.

effect such economies at the cost of long established principles which the Congress itself has not seen fit to disavow. Further, there is nothing in the Veterans Preference Act which would in any way have frustrated the obvious purpose of the MSA proviso.

The present litigation, therefore, presents a fundamental problem in statutory construction—one which has already been repeated,[11] and one which may reasonably be expected to recur. It is appropriate therefore, for this Court to address itself to this particular problem in order that the inferior courts of the federal judiciary may know authoritatively whether or not there has been a change in the law respecting implied repeal.

## II. The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court.

The question this litigation presents is of sufficient general importance in federal law to justify the issuance of the writ. A fundamental statute—one *expressly* designed to govern in instances when for any reason there had to be a reduction in civil service personnel—has been held by the Court of Appeals to be inadequate for its announced purpose. This result is supposed to be justified by implication drawn under established rules of statutory construction. There is no decision of this Court which sustains the lower court's view of those rules. In fact, there are decisions of this Court which are applicable to the issues in this litigation that conflict with the decision of the court below.

The Court of Appeals was urged to recognize the many decisions which state that implied repeals are not favored, and which spell out the conditions necessary to a finding of implied repeal. However, the court below relegated to a footnote its acknowledgment that "as a gen-

[11] Footnotes 4 and 10, *supra;* also language in Appendix C.

erality" it was "no doubt correct" that the law does not favor implied repeals. This slight appraisal of the doctrine on which petitioner relies does not square with the views of this Court. Mr. Chief Justice Hughes, speaking for a unanimous Court characterized as "a cardinal principle of construction," the proposition which the court below regards as a mere generality.[12] Curiously enough the majority opinion cites to, and even paraphrases part of, the very paragraph in which the language above quoted from Mr. Chief Justice Hughes is found; but, the paraphrase omits two key concepts and introduces a wholly new concept which is antagonistic to the basic rule. Thus, the majority cited **Borden** as follows:—

> "In a doubtful case the courts should, of course, make every effort to recognize two allegedly conflicting statutes and give effect to the language and intent of both so far as may be. **United States v. Borden Co.**, 308 US 188, 198 (1939)."

By consulting **Borden** at the page cited by the majority, the following language is found:—

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. **United States v. Tynen**, 11 Wall. 88, 92; **Henderson's Tobacco**, 11 Wall. 652, 657; **General Motors Acceptance Corp. v. United States**, 286 US 49, 61, 62. The intention of the legislature to repeal 'must be clear and manifest.' **Red Rock v. Henry**, 106 US 596, 601, 602. It is not sufficient, as was said by Mr. Justice Storey in **Wood v. United States** 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary. There must be 'a positive repugnancy between the provisions of the new law, and those of the

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[12] **United States v. Borden Co.** (Ill-1939) 308 US 188, 198.

old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.' See, also, **Posados v. National City Bank**, 296 US 497, 504." (Brackets in original).

It seems obvious to petitioner that the majority's citation of **Borden** is subject to at least three serious criticisms.

(1) It ignores the admonition that it is a *cardinal* principle of statutory interpretation that implied repeals are not favored. It will be remembered that the majority opinion attempts to sweep this categorical into a footnote where it is brushed off as a "generality." When the Supreme Court says that a particular rule of statutory construction is "a cardinal principle", petitioner does not believe that the court below is at liberty to say as to that rule that "The proposition, as a generality, is no doubt correct."

(2) It fails to even note the requirement that the two statutes be on "the same subject" and it fails to show that the MSA proviso and the Veterans Preference Act deal with the same subject matter. The two statutes do *not* deal with the same subject matter. The MSA proviso requires a reduction in force and it specifies who shall effect it. The Veterans Preference Act specifies the relative preference to be given to persons like petitioner when a reduction in force is required. One says when, how much, and by whom; the other says how.

(3) It fails to note that effect must be given to *both* statutes "if possible." Obviously, the decision of the majority gives effect to only one. It is equally obvious, from Judge Prettyman's dissent, that effect can be given to both.

A fourth point could, if necessary be made. What is the source of the qualifying words "In a doubtful case" found in the majority decision and what does that quali-

fication mean? Is the majority confessing that there is a doubt as to whether there is a conflict between the MSA proviso and the Veterans Preference Act? One thing at least is certain, no such language is found in **Borden**; instead, **Borden** specifies that the legislative intent to repeal "must be clear and manifest."

## III. Since No Other Court of Appeals Can Ever Speak on the Problem Here Involved, the Division of That Court in This Case Suggests the Need for Review by This Court.

In view of the fact that the Civil Service Commissioners must be served personally in the District of Columbia, **Blackmar v. Guerre** (La-1952) 342 US 512, 516, and since the courts require appeal to the Civil Service Commission in order to exhaust the administrative remedy, **Akelmacker v. Kelly** (NY-1951) 101 FSup 528,[13] there is no possibility of demonstrating to this Court that there is a conflict in the decisions of two or more courts of appeals on any such case as the instant one. Since there is only one court of appeals which can decide such cases as the present one, petitioner suggests that in lieu of the consideration usually given to conflicting decisions of various courts of appeals,[14] it is both suitable and proper for this Court to consider a conflict within the United

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[13] In **Akelmacker** the civil service employee was told that he could obtain judicial review only after the Civil Service Commission had acted on his appeal, and that he could obtain judicial review in the District of Columbia only.

[14] Rule 19(1)(b) of the Rules of this Court in pertinent part provides:—

". . . reasons which will be considered:

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same subject matter; . . ."

States Court of Appeals for the District of Columbia Circuit as an independent ground for certiorari in cases which can come before that court only.

## CONCLUSION

Since about half of the Government's civil service employees rely upon the very statute which the Court of Appeals has seen fit to disparage in this litigation, the general importance of the question presented by this Petition can hardly be doubted. And, since other cases have already been decided in reliance on earlier decisions below in this litigation, the continuing importance of the question seems to be equally well established.

The Court of Appeals has misconstrued a decision of this Court which should have led to a contrary conclusion below. Since the question here involved has been decided in a manner inconsistent with an applicable decision of this Court, certiorari should be granted.

There is a sharp division of opinion in the Court of Appeals on the merits of the present case. The strong dissent of Circuit Judge Prettyman is not only correct but unanswered by the majority. This conflict in the court below should be regarded as equivalent to a showing that various courts of appeals are in disagreement due to the fact that the question presented by the present litigation can never be within the jurisdiction of any other court of appeals.

Respectfully submitted,

CHARLES F. O'NEALL
FREDERICK C. BROOKE
*Counsel for Petitioner*
1625 K Street N. W.
Washington 6, D. C.
REpublic 7 1587

## APPENDIX A

### Part I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 5471—53

Myers

v.

Stassen, et al

Washington, D. C.
April 28, 1954

The above entitled cause came before Honorable Edward A. Tamm, District Judge.

*Opinion of the Court*

THE COURT: In the present action the plaintiff, a veteran of World War I, a civil service employee of the Government for some 32 years, sets forth that in September 1952 he was employed in the District of Columbia office of the Mutual Security Agency, and that on or about September 17, 1952 he was discharged from that agency. The plaintiff contends that this discharge was in violation of his rights under the Veterans Preference Act of 1944 and of certain Civil Service rules and regulations which have been promulgated under the terms of the Veterans Preference Act.

The defendant or defendants, the Administrator of the Foreign Operations Administration, within which the Mutual Security Agency is embraced, and the United States Civil Service Commissioners deny that the plaintiff's discharge was an illegal one, but state that it was justified upon the basis of the provisions of Section 504 (d) of Public Law 165 of the 82nd Congress.

The defendants justify the discharge of this plaintiff without regard to or reference to his veteran's preference rights under this specific section of the Public Law quoted: "Provided further that after the director has determined the reduction to be effected in each agency the determination as to which individual employee shall be retained shall be made by the head of the agency concerned."

The question propounded, then, to the Court at this time is whether this specific provision of Public Law 400 does, for the purpose of the reduction of staff in the operations of the Mutual Security Agency, afford to the executives of that agency the legal right to disregard the provisions of the Veterans Preference Act.

There does not seem to be, to this Court, any ambiguity in the right afforded to the director to determine the individual employees who shall be retained. Nevertheless, the Court refers to the Report of the Committee on Foreign Affairs submitted with reference to what became Public Law 400, wherein the Court finds in the discussion of the provisions of the Act this sentence on page 68: "The head of each agency is thereafter to determine in his own discretion which employees he will retain as most capable of carrying out the program without regard to existing statutes, regulations and procedures for reduction in force."

The Court is of the opinion that Congress having given the right, veterans preference in Civil Service cases, had and has the right to take away those privileges which it has granted.

The Court is of the opinion that in enacting the sentence giving the director the right to determine which employees are to be retained the Congress granted that director the power to act without regard to other acts of Congress or to Civil Service regulations.

The Court believes, then, that it is required in this situation to grant the Government's motion to dismiss this action. The Court, accordingly, grants the Government's motion, which, for practical purposes, constitutes also a denial of the plaintiff's motion for summary judgment.

## APPENDIX A

### Part II

*Order*

This cause having come on for hearing on the defendants' motion to dismiss the complaint and the plaintiff's motion for summary judgment, and the Court having considered the pleadings and memoranda filed herein, including the brief of the American Legion as amicus curiae in support of plaintiff's motion for summary judgment, and having heard arguments of counsel for the plaintiff and defendants, it is this 29th day of April, 1954,

ORDERED that the defendants' motion to dismiss is granted and the plaintiff's motion for summary judgment is denied.

/s/ Edward A. Tamm
Judge

## APPENDIX B

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This case involves the construction of the so-called MSA proviso contained in Section 7(f) of the Mutual Security Act of 1952, 22 U.S.C. § 1655(d) (1952). The proviso is to the effect that ninety days after the enactment of the Mutual Security

Act of 1952 the personnel administering the Act, with certain exceptions not material here, shall be in the aggregate at least five per cent less than the number on June 1, 1952: "Provided further, That after the Director [of Mutual Security] has determined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned."

Plaintiff-appellant was a veteran preference eligible, in the classified competitive civil service, employed by the Mutual Security Agency. He was discharged on September 17, 1952, during the ninety-day period mentioned in the MSA proviso, without regard to the reduction in force procedures prescribed by the Civil Service Commission pursuant to the Veterans Preference Act, 5 U.S.C. §§ 861, 863 (1952). His appeal to the Civil Service Commission was dismissed on the ground that under the MSA proviso his discharge was within the discretionary authority of the head of the employing agency. Plaintiff-appellant then filed this suit in the District Court. He asked that his discharge be set aside and that he be restored to his position. The District Court dismissed the complaint on the basis of the MSA proviso. This appeal followed.

In this court appellant urges that repeals by implication are not favored by the law,[1] that the MSA proviso and the Veterans Preference Act are not incompatible, and that, since the MSA proviso is unambiguous, no regard can be had to its legislative history in order to determine its meaning. That meaning, according to ap-

[1] Citing General Motors Acceptance Corp. v. United States, 286 U.S. 49, 61-62 (1932); Sims v. Rives, 66 App.D.C. 24, 84 F.2d 871 (1936). The proposition, as a generality, is no doubt correct. *Compare* Jordan v. United States, 93 U.S. App.D.C. 65, 207 F.2d 28 (1953), and cases cited *infra* in the present opinion.

pellant, appears plainly on its face to be that the Director of Mutual Security shall determine the reduction to be effected in each agency, and that the head of the agency shall carry out a reduction in force program; but in carrying out that program, he is bound to observe the requirements imposed by the Veterans Preference Act and the rules promulgated under it.

The MSA proviso says that "The determination as to which individual employees shall be retained shall be made by the head of the agency concerned." That statement is quite inconsistent with the result which would have obtained if it had been omitted from the proviso. The regulations of the Civil Service Commission on the subject of reduction in force are extremely complex, and are evidently designed to repose a minimum of power and discretion in agency heads in the administration of reduction in force programs. Most emphatically those regulations do not provide that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned." It is fair to say that they provide, in substance, exactly the contrary. See 5 C.F.R. Part 20. Yet appellant argues that the head of each agency already had power to determine which employees were to be retained in any reduction in force program—subject always to the limitations of the Veterans Preference Act and regulations thereunder. This argument, of course, is unconvincing. If it were well founded, it would reduce the proviso to mere surplusage. But it appears to us to be entirely unfounded, for the reasons just suggested.

In a doubtful case the courts should, of course, make every effort to reconcile two allegedly conflicting statutes and give effect to the language and intent of both so far as may be. *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). But this process cannot be carried to such length as to deprive one or the other of the statutes of

its essential meaning.[2] We think that is appellant's effort here: to deprive the disputed words of any real significance. Before a court accepts that course, it is certainly entitled to seek out—and we think it should seek out—the purpose of the legislation through such extrinsic aids as may be available. See *United States* v. *American Trucking Associations,* 310 U.S. 534, 544 (1940), where the Court repudiated the "literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion." See also *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479 (1943).

Looking, therefore, at the legislative history of the MSA proviso, we find this: The Proviso was drafted by the House Committee on Foreign Relations. That Committee, in its report on the bill which became the Mutual Security Act of 1952, said in explanation of the statutory text:

> "The Mutual Security Act of 1951 reduced the personnel of the Mutual Security Agency by 10 percent. But the MSA is only one of several agencies engaged in carrying out the act. The State Department, the Defense Department, the TCA also come within the scope of its provisions. Hence the committee gave close scrutiny to all the personnel engaged in the administration of the law. It interrogated witnesses and sought the advice of the executive branch on a reduction in numbers. Those paid from local currency are aliens. The local currency constitutes no charge against the United States. Personnel paid from program funds are numerically the largest. To effect a reduction in their numbers, however, ap-

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[2] See United States v. Jordan, 109 F.Supp. 528 (D.C. D.C.), *Affirmed,* 93 U.S.App.D.C. 65, 207 F.2d 28 (1953); Smith v. Day & Zimmerman, 65 F.Supp. 209 (S.D.Iowa 1946); Arenas v. United States, 60 F.Supp. 411, 425 (S.D.Cal. 1945), *affirmed,* 158 F.2d 730 (9th Cir. 1946), *cert. denied,* 331 U.S. 842 (1947).

peared to work undue hardship on the programs. They include such diverse groups as technicians working on Point IV programs and ungraded civilian workers employed in arsenals and Government yards. Many of the latter group are on a daily or hourly pay basis. In the case of technicians a cut-off date would place a heavy burden on TCA. Its personnel strength is still far short of the targets that the Congress has approved.

"The Committee has recommended a 10 percent reduction in military personnel and those paid from administrative funds, with certain exceptions. It is estimated that this provision will result in a reduction of over 1,000 people.

"Unless care were taken in writing this amendment, the last employed would be the first discharged. This was not the primary objective of the amendment. The committee was desirous of eliminating the drones. It therefore gave careful attention to the language of the proviso. In order that the reduction may be carried out without any loss of effectiveness the Director for Mutual Security is to distribute the cut among the various agencies. The head of each agency is thereafter to determine in his own discretion which employees he will retain as most capable of carrying out the program, without regard to existing statutes, regulations and procedures for reduction in force."[3]

From this history we must conclude that the proviso was intended—in the limited number of cases to which it had application—to give agency heads broad discretion-

[3] H.R.Rep. No. 1922, 82d Cong., 2d Sess. 67-68 (1952). Nothing to the contrary of this statement appears anywhere in the legislative history so far as we have been advised. The bill went to the floor, was debated, went to conference and finally to the White House. Nowhere does there appear any statement or comment contrary to that of the House Committee which had drafted the bill, and the language of the proviso as drafted by that Committee remained untouched in the conference report.

ary power to discharge employees, "without regard to existing statutes, regulations and procedures for reduction in force". We further conclude that in the matter of reductions in force in Federal agencies, contrary to what appellant argues, the Veterans Preference Act occupies the position of a general law and the MSA proviso that of a special law, applying only to one particular reduction in force in one specified agency and not impairing or affecting in any way the rules applicable to reductions in force in other agencies or even in MSA beyond the five per cent reduction in force ordered by Congress in the Mutual Security Act of 1952. As such, the proviso must prevail. *MacEvoy Co.* v. *United States*, 322 U.S. 102 (1944); *Shelton* v. *United States*, 83 U.S. App.D.C. 32, 165 F.2d 241 (1947).

For these reasons, the judgment of the District Court dismissing the complaint must be

*Affirmed.*

PRETTYMAN, *Circuit Judge*, dissenting: I would reverse in this case. The disputed provision in the Mutual Security Act is that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned." I think that provision contemplates a determination by the agency head in accordance with law. It does not repeal existing law on the methods to be pursued in reductions in force, and it does not by the remotest suggestion create an exception to all such existing law. It does not release the agency head from the otherwise valid restrictions imposed by the President, the Congress, or both together.

It is a familiar rule that repeal by implication is found only by reason of necessity. No necessity exists here; the provision can be read with complete sense in conjunction with existing law. If, for example, a statute on some subject should contain a provision that determinations in

disputes arising thereunder should be made by a District Court, that provision would not repeal or create an exception to the Rules of Civil Procedure or to any established principles governing adjudications. Such a statutory provision is merely a designation of the agency to which authority is confided; it is not a prescription of standards or procedure.

Sentences in the Mutual Security Act preceding the quoted provision refer repeatedly to functions to be performed by the Director for Mutual Security. I read the disputed proviso as merely a careful insurance by the draftsman against the idea that the Director should pick the personnel to be released. The simple meaning of the statute, as I read it, is that the Director shall do so-and-so but that when it comes to picking the personnel for release the head of the agency shall do the job. Maybe, as my brethren suggest, the proviso in issue here was unnecessary to accomplish the meaning I attribute to it. But surely it serves the purpose of a precautionary clause and marks the boundaries of the Director's duties in carrying out the ordered reduction in force. Although it may have been unnecessary for the purpose of giving agency heads power to choose the personnel for release, it serves to avoid any suggestion that the agency heads no longer have that power. In that sense the proviso is not "mere surplusage" under my construction; it was the result of careful drafting. Many statutes contain precautionary clauses which are good draftsmanship although unnecessary. A prime example is the Bill of Rights, the first Eight Amendments.

Moreover I think Congress did not mean by this enactment to repeal for these purposes all preferential rights of veterans. I would be surprised, even shocked, if it were shown that Congress had that intent in such an innocent-looking statutory clause. The whole congressional history in this field is contrary to such an intent.

## APPENDIX C

Section 504(d) of the Mutual Security Act of 1951 22 USC 1655(d)(1):

"(d) On and after January 1, 1952, the number of United States citizens employed by the Mutual Security Agency shall be at least 10 per centum less than the number employed by the Economic Cooperation Administration on August 31, 1951: *Provided* That the Director for Mutual Security shall cause studies to be made from time to time for the purpose of determining whether further reductions in personnel are feasible and consistent with the accomplishment of the purposes of this Act."

## APPENDIX D

Section 7(f) of the Mutual Security Act of 1952: 22 USC 1655(d)(2) and (3). [NB. Referred to in the Petition as "the MSA proviso"]:

"Before the period at the end of section 504(d), insert the following: ': *Provided further,* That, ninety days after the enactment of the Mutual Security Act of 1952, the number of civilian employees who are United States citizens, receiving compensation or allowances from the administrative expense appropriations authorized by this Act, employed in the United States and overseas by or assigned to the Mutual Security Agency, or employed by or assigned to the Department of State or the Department of Defense for carrying out programs the appropriations for which are authorized by this Act, and the military personnel assigned to such programs, shall be in the aggregate at least 5 per centum less than the number so employed or assigned on June 1, 1952, except for such personnel of the Department of Defense engaged in the manufacturing, repair, rehabilitation, packing, handling, crating, or delivery of materiel: *Provided further,* That after the Director has deter-

mined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned.'"

## APPENDIX E

Section 12 of the Veterans Preference Act of 1944, as amended; 5 USCA 861:

"*Reduction in personnel; considerations affecting release.* In any reduction of personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when an agency is replaced by some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

## APPENDIX F

**Section 2 of the Veterans Preference Act of 1944, as amended; 5 USC 851:—**

## CHAPTER 17.—PREFERENCE OF VETERANS IN GOVERNMENT EMPLOYMENT

### §851. Persons entitled to federal employment preferences

In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the Department of the Army or Department of the Air Force or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), or during the period specified in clause (6)

of this section, and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions; (5) mothers of deceased ex-servicemen or ex-servicewomen who lost their lives, under honorable conditions while on active duty in any branch of the Armed Forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), or during the period specified in clause (6) of this section, or of service-connected permanently and totally disabled ex-servicemen or ex-servicewomen who were separated from such Armed Forces under honorable conditions if—

(a) the father is totally and permanently disabled, or

(B) the mother was widowed, divorced, or separated from the father and—

(1) has not remarried, or

(2) has remarried but (i) her husband is totally and permanently disabled or (ii) she is divorced or legally separated from her husband or such husband is dead at the time preference is claimed; and

(6) those ex-service men and women who have served on active duty in any branch of the Armed Forces of the United States during the period beginning April 28, 1952, and ending July 1, 1955 (the period after the termination of the state of war between the United States and the Government of Japan during which persons may be inducted under existing law for training and service in the Armed Forces), and have been separated from such

Armed Forces under honorable conditions. As amended July 26, 1947, c. 343, Title II, § 205(a), Title III, § 305(a), 61 Stat. 501, 508; Jan. 19, 1948, c. 1, § 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; Aug. 26, 1949, c. 513, 63 Stat. 666; Dec. 27, 1950, c. 1151, § 1, 64 Stat. 1117; July 14, 1952, c. 728, § 1, 66 Stat. 626.